ARIZONA
REAL ESTATE BULLETIN
Arizona Department of Real Estate • Vol XXVI, No. 4
February 2001
On-line Edition
www.re.state.az.us

Lombardo v. Albu

by Thomas Stoops
Reprinted from the February issue of the Arizona Journal of Real Estate & Business, *with permission.*

We have written several articles over the last year relating to the case of Lombardo v. Albu, 299 Ariz. Adv. Rep. 13 (App. July 13, 1999), including analysis of the effect of Lombardo, and the fact that the Arizona Supreme Court has been asked to review the decision.

The Arizona Association of Realtors filed an *amicus* brief in support of the decision in Lombardo, while the Arizona Attorney General's Office, on behalf of the Arizona Department of Real Estate, opposed it. On December 13, the Arizona Supreme Court made its ruling, overturning the decision of the Arizona Court of Appeals. The decision, authored by Justice Martone, summarizes the case as follows:

This is an action in tort in which the seller of real property seeks damages from the buyer's real estate agent for failing to inform the seller that the buyer was or might have been unable to perform because of financial difficulties. The trial court granted summary judgment in favor of the buyer's agent on the basis that the buyer's agent had no legal duty to the seller. The court of appeals affirmed. ...Because of the importance of the issue, and a conflict with *Aranki v. RKP Investments, Inc.* [citation omitted] we granted review.

The Lombardos, as plaintiffs in the action, argued alternative theories before the Arizona Supreme Court. First, they argued that the Arizona Department of Real Estate regulation requiring the buyer's agent to disclose the fact that his buyer might be financially unable to perform, created a standard of care for their negligence action. Alternatively, the Lombardos argued that the regulation forms the basis for a private cause of action directly on the regulation. Albu argued that the negligence claim fails as a matter of law because the buyer's agent has no legal duty to the seller, and claimed that no private cause of action arises from the regulation. The underlying regulation, Ariz. Admin. Code R4-28-1101, provides in relevant part, as follows:

> A. A licensee owes a fiduciary duty to his client and shall protect and promote the interests of the client. The licensee shall also deal fairly with all other parties to a transaction.
> B. Each licensee participating in a real estate transaction shall disclose to all other parties to the transaction any information which the licensee possesses which materially and adversely affects the consideration to be paid by any party to the transaction, including, but not limited to, the following matters:
> 2. Any information that the buyer or lessee is, or may be unable to perform due to insolvency or otherwise.

Justice Martone began his analysis of whether the buyer's agent had a duty to disclose to the seller the financial inability of the buyer to perform, focusing on the duties between the buyer and the seller. The court noted, " [T]he buyer and seller, of course, have legal duties to each other arising out of their contractual relationship. This includes the covenant of good faith and fair dealing. Buyers and sellers must deal fairly with each other. And, the buyer and the seller have duties to each other to disclose facts that are material to the transaction.…" Justice Martone goes on, stating, "...our court of appeals held some time ago that where a seller knows of facts materially affecting the value of the property and knows that the facts are not known to the buyer, the seller has a legal duty to disclose such facts. Hill v. Jones.... (citations omitted). Thus, the seller had a duty to disclose to the buyer the existence of termite damage whenever it materially affects the value of the property."

The court goes on to state that the duties are not a "one-way street," noting that the buyer cannot present himself as a ready, willing, and able buyer if he knows that there is a significant risk that the deal will never close because of his inability to perform. The court holds that such a failure to disclose would violate the buyer's duty to deal fairly under the contract and legal duties imposed by the Restatement (Second) of Contracts

Continued on page 10

AG's Office: 'Rule is valid'

Assistant Attorney General Michael Denious, who was one of the attorney's representing the Department in arguing *Lombardo v. Albu* before the Arizona Supreme Court, said the court's decision "makes it clear that Commissioner's Rule R4-28-1101 is a valid statement of the law, and that its formulation of the duty to deal fairly can properly be applied along with the fiduciary duty.

"The Court unanimously held that a real estate agent may be liable under a common-law negligent misrepresentation theory for failing to disclose to the other party to a real estate transaction that the agent's client, the buyer, may be unable to perform. The court further held that the duty to deal fairly under the Commissioner's Rules, which requires an agent to disclose to all parties 'any in-

Continued on page 10

Referral Rebates and Kickbacks:

Disclosure and permission crucial to 'doing it right'

By Edwin J. Ricketts
Reprinted from the January issue of the Arizona Journal of Real Estate & Business,*with permission.*

[Note: "Realtor" in the context of this article means a member of an Association of Realtors. Ed.]

Few subjects generate as much emotion in real estate circles as the subject of undisclosed profit. Especially where a rebate or kickback is concerned in return for a referral, this subject can get a little murky. Add in emotion and—voila!—you've got a hot topic.

The law and the National Association of Realtors Code of Ethics both have a lot to say about the requirement of disclosure to and permission from a client before a licensee may receive a rebate or kickback for referral of services to the client. But even without the law or Code of Ethics, doesn't a common sense of decency and fairness dictate advance disclosure and permission before profiting off a client? Isn't that sense of decency and fairness what we, as real estate professionals, hold ourselves out as subscribing to?

The Standard of Care

A.A.C. R4-28-1101(G)

This Commissioner's Rule has an awesome effect on the legality of how we deal with our clients. It reads: *"A licensee shall not accept any compensation, rebates or profit for transactions made on behalf of a client without the written consent of the client."*

The rule includes any rebates, kickbacks, fees, commissions, compensation of any sort, that licensees may receive as the result of a referral to another service provider, e.g., swimming pool contractor, home builder, home warranty company, transaction coordinator, etc. In short, profiting from a client's transactions without the client's prior knowledge and consent is illegal.

Article 6, NAR Code of Ethics

The Code of Ethics is very specific: "Realtors shall not accept any commission, rebate, or profit on expenditures made for their client, without the client's knowledge and consent.

"When recommending real estate products or services (e.g., homeowner's insurance, warranty programs, mortgage financing, title insurance, etc.), Realtors shall disclose to the client or customer to whom the recommendation is made any financial benefits or fees, other than real estate referral fees, the Realtor or Realtor's firm may receive as a direct result of such recommendation."

Examples

The Swimming Pool Contractor

Not infrequently a buyer's agent will refer a client to a pool contractor, or even contact the pool contractor without the knowledge of the client, in return for a kickback. Receiving a kickback in such an instance is a violation of the law and the Code of Ethics. Prior written consent from the buyer must be obtained before receiving this "thank-you" from the pool contractor.

Home Warranty Company

Many licensees still opt to receive a modest (typically up to $50) kickback from the home warranty company in return for referring a client to them. Here again, advance written permission is required for the agent to profit off the client. Also, because the home warranty is a settlement service under RESPA (Real Estate Settlement Procedures Act), receipt of the fee without the agent providing genuine market-based service is an illegal kickback under RESPA. However, whether or not services for the fee are actually performed, A.A.C. R4-28-1101(G) requires the advance consent of the client.

Transaction Coordination Fee

A number of brokerages assess clients a fee to oversee the processing of the transaction, providing an additional check on the escrow agent, lender, inspectors, etc. This fee is generally disclosed up-front and is signed off on by the client. However, if the fee does not all go to pay the transaction coordination function, further disclosure is required. For instance, if a portion of the fee is to be distributed to the agent and/or the brokerage, that needs to be disclosed to the client before the client agrees to the fee. Partial disclosure is as bad as – or worse – than no disclosure at all.

Home Builders

When a licensee refers a client to a custom home builder, a "referral fee" often results. If the buyer-client has not consented to this kickback, it is an unlawful payment. Often, the agent will refer a client to three home builders, suggesting the client interview them and select one. However, what is seldom disclosed to the client is that the agent will receive a kickback. In some cases, the home builders have undisclosed agreements with the brokerage to be one of the brokerage's referral builders. Sometimes, a mention is made in the construction contract that a fee may be paid to the brokerage, but because that disclosure is designed to be late in the decision making process and is not pointed out to the client, the disclosure is probably not timely or sufficient. Regardless, it is the licensee who has the obligation to make the disclosure, not the home builder.

Sale of Property Management Agreements

The law requires that no property management agreement may be assigned to another broker without the express written consent of the property owner. A.R.S. §32-2171(A)(1)(j). Frequently, however, the assignment of a property management agreement is made for a fee. In this case, the owner must be informed that as the result of the assignment the assigning broker is making a profit, and the owner must consent to that in writing.

Law vs. Code of Ethics

Although A.A.C. R4-28-1101(G) requires the written consent of clients, no such consent is required of customers. However, the Code of Ethics was clarified in 1999 to include customers as well as clients. So, if a licensee is not a Realtor, and the principal is not a client, may the licensee profit off a referral of the customer to a service provider, without first making disclosure to and obtaining the consent of the customer? If no agency relationship, ratified or implied, is created, there appears to be no violation of R4-28-1101(G), and the Code of Ethics cannot be enforced against the non-Realtor.

Consequences of Violations

Department of Real Estate

A violation of R4-28-1101(G) could result in disciplinary action against a licensee, including denial, suspension or

Continued on page 8


Jerry Holt

News From The Commissioner

Congratulations are in order for Michael Denious, the Assistant Attorney General who represents the Department who, with the support of Unit Chief Robert Zumoff, successfully presented the Department's position before the Arizona Supreme Court in *Lombardo v. Albu*.

I'm sure many of you are familiar with this case which is very compentently summarized by real estate attorney Thomas Stoops on page 1.

Had the trial and appellate court decisions stood, holding that a licensee cannot disclose the knowledge that the licensee's client is insolvent and cannot or may not be able to perform in the purchase or sale of real property, it would have sent a chill throughout the real estate industry, not only in Arizona but across the nation.

It is my opinion that the vast majority of real estate licensees sincerely want to protect the interests of their client (and rightly so) but they also strongly desire to be fair and honest to all parties to the transaction as stated in Commissioner's Rule R4-28-1101(A) and (B). The essence of the real estate business is to have happy buyers and happy sellers. If you don't, you won't last long in the real estate business.

We are fortunate to have Mike looking out for the interests of not only the Department but of real estate licensees everywhere.I'm happy to report to you that our proposed legislation is moving nicely through the Legislature. Both bills, HB 2023 and HB 2024, have now passed the House of Representatives with flying colors and have been moved to the Senate where I expect them to experience equally smooth sailing.

If you haven't already heard, it appears there is a movement afoot to allow banks and "affiliates" of banks to get into the real estate business! This would include listing properties, showing homes and connecting real estate buyers and sellers. Ostensibly, these financial institutions could legally charge and collect a commission for their services in the same way that is currently reserved for real estate licensees.

In December 2000, the Federal Reserve and the U.S. Treasury released a proposed rule that would allow bank "affiliates" to perform real estate transaction services and manage residential and commercial properties including rent collection and lease negotiations.

The two federal agencies are taking public comment on the proposed new rule through March 2, 2001. I pray you will not only comment to these agencies but write to your U.S. Senators and Congressman or Congresswoman and PROTEST, Vehemently!

We are saddened to learn of the passing of Duane Turner who served the Department for 20 years before his retirement in 1998.

Duane was held in high regard by licensees and developers in the Tucson area and did an exemplary job as Director of Operations of our Tucson Office. Vaya con Diós, mi amigo.

ARIZONA REAL ESTATE BULLETIN

An official publication of the
State of Arizona
Department of Real Estate
2910 N. 44th Street, Suite 100
Phoenix, Arizona 85018
(602) 468-1414
Fax (602) 468-0562

400 W. Congress, Suite 523
Tucson, Arizona 85701
(520) 628-6940
Fax (520) 628-6941

Jane Dee Hull
Governor

Jerry Holt
Commissioner

Charles M. Downs
Editor
cdowns@re.state.az.us

REAL ESTATE ADVISORY BOARD
R.L.Brown, Chairman
Munds Park
Richard C. Allen, Vice Chairman
Phoenix
Eugene E. Cox, Phoenix
Vicki L. Cox-Golder, Tucson
Robert Thomas Flibotte, Payson
Gary Lee, Yuma
Paul Lindsey, Tucson
Mauro Pando, Phoenix

The Arizona Real Estate Bulletin is published six times each year and is available from the Department's World Wide Web site at http://www.re.state.az.us.
First-class mail subscriptions: $10 per year.

Useful web addresses

Arizona State Agencies
www.state.az.us/all.html

Arizona Legislative Information System
Bills in the Legislature
Arizona Revised Statutes
www.azleg.state.az.us/

Department of Real Estate Phone Numbers,
organization, email addresses
www.re.state.az.us/phones.html

Arizona Real Estate Law Book Online
www.re.state.az.us/print.html

Approved Real Estate Schools
www.re.state.az.us/Schools.html

Department of Environmental Quality
Superfund and WQARF site maps
www.adeq.state.az.us/environ/waste/sps/

Maricopa County Recorder's Office
Online access to recorded documents
recorder.maricopa.gov/recdocdata/

Association of Real Estate license Law Officials (ARELLO)
Links to real estate jurisdictions in all states
www.arello.org

Arizona Association of Realtors®
www.aaronline.com

Arizona Associations and Boards of Realtors®
www.re.state.az.us/realtors.html

Statewide Weather Information
www.azfms.com/weather.html

**The mission of the
Arizona Department of Real Estate
is to safeguard and promote the public interest
through timely and capable assistance,
fair and balanced regulation,
and sound and effective education.**

ADMINISTRATIVE ACTIONS

REVOCATIONS

00A-094
Anastacio Gilbert Garcia
Canyon Lake, Calif.
DATE OF ORDER: January 25, 2001
FINDINGS OF FACT: In his September 1999 application for a real estate salesperson's license, Respondent failed to disclose multiple felony convictions in California. Respondent failed to appear at the administrative hearing.
VIOLATIONS: Respondent has been convicted of a felony; Respondent made a substantial misrepresentation; Respondent is not a person of honesty, truthfulness and good character; Respondent has violated a law that involves forgery, theft, substantial misrepresentation, fraud or dishonest dealings in violation of A.R.S. § 32-2153(B)(1), (2), (3), (7) and (10).
Disposition: Respondent's real estate salesperson's license is revoked.

APPLICATIONS DENIED

00A-092
Kyra Jo Brown
Flagstaff
DATE OF ORDER: December 15, 2000
FINDINGS OF FACT:In her May 31, 2000 application for a real estate salesperson's license, Petitioner disclosed she had been convicted of a "felony, misdemeanor or other crime." The Department established Petitioner has been convicted of 29 misdemeanors, most of them when she was intoxicated. Her most recent conviction was on April 8, 2000,
DISPOSITION: Petitioner's application for a real estate salesperson's license is denied.

00A-108
Frank A.Smrz
Dolan Springs
DATE OF ORDER: January 5, 2001
FINDINGS OF FACT: In his July 2000 application for a real estate broker's license, Petitioner disclosed a 1993 felony conviction for Bank Fraud and Aiding and Abetting.
VIOLATIONS: Petitioner has been convicted of a felony and a crime of moral turpitude within the meaning of A.R.S. § 32-2153(B)(2). The evidence at an administrative hearing established that Petitioner has made substantial misrepresentations within the meaning of A.R.S. § 32-2153(B)(3).
DISPOSITION: Petitioner's application for a real estate broker's license is denied.

CONSENT ORDERS

00A-050
Roger D. Michael
Phoenix
DATE OF ORDER: November 1, 2000
FINDINGS OF FACT: The Department issued an original real estate broker's license to Respondent in January 1987. He is currently and was at all times material to this matter licensed as designated broker for RM Sales Management, L.L.C., a licensed limited liability company in Arizona. Respondent's license expires on January 31, 2001.

In July 1999, a Public Report was issued to RML, Inc., for two dwelling units divided into 104 time-share intervals of Villas at Rancho Manana Resort. Page 6 of the Public Report specifies that the purchasers' earnest money be deposited into a neutral escrow depository.

Between July 30, 1999 and December 22, 1999, Respondent and other licensees employed by RM Sales sold or offered to sell time-share intervals in the Villas at Rancho Manana Resort to 57 purchasers.

The prospective buyers were provided with Purchase Contracts which provide in part that earnest money be held by Seller and not placed in a neutral escrow depository. This provision is in direct conflict with the provisions of the Public Report.

The Purchase Contracts also provided that document preparation fees be paid to RML, Inc. Respondent, as designated broker for RM Sales, was responsible to ensure that document preparation fees were not charged.

Between July 30, 1999, and December 22, 1999, Respondent collected document preparation fees from $180 to $230, as well as earnest monies from the prospective purchasers. He failed to deposit the earnest monies into a neutral escrow depository as specified in the Public Report and is unable to account for any monies collected.

On December 22, 1999, RML, Inc. filed an application to amend the Public Report pursuant to A.R.S. § 32-2197.03 wherein RML, Inc. agreed to voluntarily suspend sales.

Two previous Consent Orders were entered in May, 2000 in the matters of RM Sales and RML, Inc., Among other things, the Consent Orders required RM Sales and RML, Inc. to refund document preparation fees and offer rescission to the 57 purchasers referenced above. All 57 purchasers elected rescission.

On October 6, 2000, RML, Inc. sold the Villas at Rancho Manana Resort through escrow at Stewart Title and Trust of Phoenix, Inc. According to the escrow instructions, Stewart Title refunded all monies owed the 57 purchasers from the proceeds of this sale, in compliance with the terms of Consent Order No. 00A-050.
VIOLATIONS: Respondent, as designated broker for RM Sales, failed to exercise his duty to ensure that no document preparation fees were collected, in violation of the Arizona State Constitution Article XXVI, Section 1. His failure to reasonably supervise licensees in his employ, within the meaning of A.A.C. R4-28-302(I)(1), constitutes a violation of A.R.S. § 32-2153(B)(21).

Respondent, as designated broker for RM Sales, demonstrated negligence in performing the acts for which a license is required, in violation of A.R.S. § 32-2153(A)(22). His failure to confirm that the earnest money was deposited into a neutral escrow depository in compliance with the terms of the Public Report, as required by A.R.S. §§ 32-2151 and 32-2151.01, constitutes a violation of A.R.S. § 32-2153(A)(3).
DISPOSITION: Respondent to pay a civil penalty in the amount of $1,000. Respondent to attend nine hours of approved continuing eduction, in addition to hours required for license renewal, in the categories of Commissioner's Standards (Broker Management Clinic) / Contract Law / Subdivision Law.

00A-103
Roark Sandberg
Manhattan Beach, Calif.
DATE OF ORDER: November 2, 2000
FINDINGS OF FACT:Respondent was conveyed a total of 18 lots in a 1935 county-platted subdivision called New Deal Acres Unit No. One in Mohave County. The first 13 lots and moments of transfer to Sandberg are: on April 28, 1999 he was conveyed lots 21 through 32, and on July 22, 1999, lot 10 (the "Original 13 Lots") The Original 13 Lots were all acquired by warranty deed.

Respondent sold eight lots from the Original 13 Lots without a public report. Subsequently, the Department was advised that lot sales by Respondent were occurring in the New Deals Unit One without a public report.

Respondent was contacted by the Department for a response in this matter. He advised the Department that he was confused over the issues but has determined that he is not in compliance with the subdivision statutes of Arizona.

In an effort to come into compliance with the statutes, Respondent has applied for a public report which is pending.

Subsequent to the sales of lots from within the Original 13 Lots, on July 24, 2000, Respondent acquired lots 2, 5, 6, 7 and 8 in the New Deals Unit One, all by warranty deed.
VIOLATIONS: As a result of Respondent's failure to acquire a public report prior to the sale of the lots, he violated A.R.S. §§ 32- 2181(A) and 32-2183(F).
DISPOSITION: Respondent shall pay a civil penalty in the amount of $1,000. He shall acquire a public report from the Department prior to further sales. He shall provide evidence to the Department that he has offered rescission of sale to those persons to whom he has sold one or more lots.

00A-009
Rudy V. Anaya, dba Rudy V. Anaya Realty & Insurance
Phoenix
DATE OF ORDER: November 9, 2000
FINDINGS OF FACT: Respondent was issued an original real estate broker's license in March 1965. He is currently and was at all times material to this matter licensed as a self-employed broker, doing business as Rudy V. Anaya Realty & Insurance. His broker's license expires January 31, 2001.

In December 1998, Respondent listed for sale vacant property in Phoenix owned by Norma Hurt. In May 1999, Respondent prepared a Vacant Land Purchase Contract by which Norma Grado agreed to purchase the property. Respondent identified himself as agent for both Hurt and Norma Grado in the Purchase Contract.

On page 1 and 7 of the Purchase Contract, Respondent identified the property as having C-3 zoning. Pursuant to City of Phoenix Code, C-3 commercial general district zoning is a district designed to provide for intensive commercial uses necessary to the proper development of the community.

In August 1999, Respondent prepared an Addendum to the Purchase Contract which identified the buyers as Norma Grado and Monico Grado. The buyers purchased the property with the intent to operate an auto glass repair business which requires C-2 or C-3 zoning. Buyers told Respondent that they required property zoned for their auto glass business.

Although Respondent represented to buyers that the property was zoned C-3, he did not take steps to verify this. After purchasing the property, buyers learned from the City of Phoenix that the property was zoned C-1, a district of light neighborhood retail and customer service uses. Buyers are unable to lawfully operate an auto glass business on the property under its C-1 zoning.

Respondent attests that he advised buyers that they should confirm that their desired use of the property was consistent with the zoning. Respondent further attests that buyers advised him that they had or would independently confirm that they would be able to operate their business on the property.
VIOLATIONS: Respondent's representation of the incorrect zoning, and failure to disclose the correct zoning, constituted a breach of his fiduciary duty to his clients, within the meaning of A.A.C. R4-28-1101(A). Respondent disregarded or violated provisions of the Commissioner's Rules, within the meaning of A.R.S. § 32-2153(A)(3).

Respondent's conduct constituted negligence in performing the duties for which a broker's license is required, within the meaning of A.R.S. § 32-

Continued on page 6

Continued from page 5

2153(A)(22).
DISPOSITION: Respondent's broker's license shall be suspended for 75 days beginning 10 days after the date of this Order.

Respondent shall pay a civil penalty in the amount of $1,000. Respondent shall attend six hours of continuing education, in addition to hours required for renewal, in the category of Commissioner's Standards and Real Estate Legal Issues.

00A-060
In the matter of the application for renewal of the real estate broker's license of James A Pallott, dba Lincoln Realty, L.L.C. fka ERA Lincoln Realty, and in the matter of the application for renewal of the real estate broker's license of Judith I. Pallott, dba Lincoln Realty, L.L.C. fka ERA Lincoln Realty, and in the matter of the real estate broker's license of Lincoln Realty, L.L.C. fka ERA Lincoln Realty
DATE OF ORDER: NOVEMBER 27, 2000.
FINDINGS OF FACT: On February 29, 2000, James Pallott and Judith Pallot submitted renewal applications for real estate brokers' licenses to the Department.

Lincoln Realty, formerly known as ERA Lincoln Realty, obtained a limited liability company real estate broker's license in February 1995. That license will expire on February 28, 2001. At all times material hereto, James Pallott was the designated broker of Lincoln Realty.

On September 30, 1999, ERA Franchise Systems, Inc. terminated its Membership Agreement and rights associated with Lincoln Realty. On February 17, 2000, ERA asked the Pallotts to immediately cease and desist using the ERA trademarks.

In their renewal applications, Respondents failed to disclose that in January 2000, a default judgement was entered against them. The Court found that Defendants were served with process and failed to appear, and that Plaintiffs be awarded judgment in the amount of $250,000 for Breach of Contract, and $5,000 for Negligent Infliction of Emotional Distress. The Pallotts did not disclose the judgment entered against them on their renewal applications.

In May 18, 2000, a Default Judgment was entered against the Pallotts. Again the Pallotts failed to appear. Plaintiffs were awarded Judgment in the amount of $37,500 and interest in the amount of $18,212.32 for Fraud, Constructive Fraud and Breach of Fiduciary Duty. The Pallotts did not timely disclose the Judgment to the Department.

In April 2000, a Default Judgment was entered against the Pallotts in the amount of $7,500 for Breach of Contract and Unjust Enrichment. Other judgments were entered against the Pallotts in May 2000 in the amount of $80,000. An Arbitration Award was entered against Respondents in September 1999 in the amount of $80,000. Neither of these judgments was disclosed to the Department.

In January 2000, James Pallott entered into a Consent Order with the Department regarding mishandling of earnest money deposits while acting as a real estate agent. He was assessed a civil penalty in the amount of $2,000 and ordered to attend continuing education classes. He has been delinquent in making monthly payments to the Department and has not submitted his proposed continuing education classes, a proposal due by April 14, 2000.
VIOLATIONS: The Pallotts disregarded or violated provisions of Arizona Revised Statutes, Title 32, Chapter 20, and Commissioner's Rules in violation of A.R.S. § 32-2153(A)(3).They procured or attempted to procure a license by filing renewal applications which are false or misleading in violation of A.R.S. § 32-2153(B)(1). They made substantial misrepresentations in violation of A.R.S. § 32-2153(B)(3). They have been found guilty of conduct which constitutes fraud or dishonest dealings within the meaning of A.R.S. § 32-3153(B)(5). They have not shown they are honest, truthful and of good character within the meaning of A.R.S. § 32-2153(B)(7). James Pallot has violated the terms of the Department's Administrative Order in violation of A.R.S. § 32-2153(B)(9). The Pallotts breached their fiduciary duty to their clients and did not protect and promote their clients' interests as required by A.A.C. R4-28-1101(A). They failed to disclose the civil judgments entered against them within 10 days as required by A.A.C. R4-28-301(F).
DISPOSITION: James Pallott's real estate broker's license is revoked upon entry of this Consent Order. Lincoln Realty's real estate broker's license is revoked effective upon entry of this Consent Order.

Judith Pallott's application for renewal of her real estate broker's license is denied. The Commissioner will issue Judith Pallott a two-year provisional real estate salesperson's license. She shall comply with the following terms and conditions during all periods of active and inactive status:

a. Within 10 days of employing Judith Pallott, each employing broker shall file with the department's Compliance Officer a signed statement certifying that the broker has received a copy of this Consent Order and agrees to act as her practice monitor. The broker shall submit bi-monthly written reports which attest to her workload, as well as the quality of her services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

b. Judith Pallott or any entity associated with her shall not hold or control 10 percent or greater interest in any real-estate related business.

00A-132
Lennar Homes of Arizona, Inc.
Phoenix
DATE OF ORDER: November 28, 2000
FINDINGS OF FACT: Lennar was and is the owner and developer of North Park. On May 18, 1999, Lennar was authorized by the Department to enter into conditional sales contracts for the sale of lots in North Park. On June 7, 1999, the Department issued a Subdivision Public Report to Lennar Homes for North Park.

Between September 29, 1999 and May 26, 2000, Michael R. Dowell was a salesperson employed by Lennar. As of July 26, 2000, Dowell has been employed and continues to be employed as designated broker of Lennarstone Marketing Group, the authorized sales entity of North Park since July 26, 2000.

To satisfy the financial assurance requirements of A.R.S. §§ 32-2181(A)(17) and 32-2183(D), Lennar agreed not to close escrow on the lots covered by the Public Report until all subdivision improvements had been completed.

Dowell, during his tenure as designated broker of Lennarstone, completed the closing of 27 escrows in North Park contrary to the Public Report application and the resulting Public Report. Twenty-five of the 27 closings did not contain the certificate of occupancy clearance addendum and 10 closings did not contain the required receipt for Public Report.
VIOLATIONS: Respondent sold and closed escrow on lots in violation of A.R.S. §§ 32-2183(D) and 32-2184(A), and Commissioner's Rule A.A.C. R4-28-805.
DISPOSITION: Lennar shall pay a civil penalty in the amount of $10,000. Lennar shall amend the Public Report to correct disclosures, including projected completion dates and assurances for completion. Lennar shall advise all 27 purchasers that Lennar missed the completion date for certain subdivision improvements and therefore amended the Public Report. Lennar shall provide the amended Public report to all 27 buyers and obtain a receipt from each buyer.

00A-131
In the matter of Grandvista at Painted Mountain, L.L.C., and Grand Vista Sales & Marketing, L.L.C., and Marie Therese Roberts
Phoenix
DATE OF ORDER: December 5, 2000
FINDINGS OF FACT: Grandvista Sales & Marketing (GSM) holds an entity real estate broker's license and is the marketing entity for the Villas time-share project.

Marie Therese Roberts is the designated broker for GSM.

Grandvista sold time-share intervals in the Villas without amending the Time-share Public Report to include the intervals or obtaining another public report or an exemption.

Grandvista, GSM and Roberts have represented that:

a. The sales did take place prior to authorization.

2. The sales were purely a data-processing error and unintential.

3. All units were fully completed and furnished at the time of their sale.

4. This is the first event of this type in which Respondents have been involved and they agree not to commit this violation again.

5. The unannexed units are identical in content and rights to the previously annexed units already covered by the Public Report.

6. The amended Public Report, when issued, will not add or modify any disclosure that would have been material to purchasers of the intervals in making their decision to buy.

7. All owners/purchasers received all of the use rights and other benefits they bargained for.

8. All of the owners/purchasers received the Public Report, except for the corresponding pending amendment.

Grandvista has applied for amendment of the Public Report to include the time-share intervals.
VIOLATIONS: Grandvista, GSM and Roberts offered for sale and sold time-share intervals in violation of A.R.S. §§ 32-2153(A)(3), 32-2197.01, 32-2197.03(A)(2), and Commissioner's Rule A.A.C. R4-28-B1203.
DISPOSITION: Grandvista, GSM and Roberts shall jointly pay a civil penalty in the amount of $5,450. Grandvista to amend the Public Report to include the intervals within 30 days of entry of this order.

99A-0146
D. Thomas Stapley
Gilbert
DATE OF ORDER: December 21, 2000
FINDINGS OF FACT: In his 1991 and subsequent license renewal applications, Respondent failed to disclose certain lawsuits involving the real estate development company Val Vista Lakes Development and the filing of bankruptcy petition in that regard. Respondent asserts these lawsuits and the bankruptcy petition were all a matter of public record.

At all times material to this matter, Respondent was licensed as a real estate broker.
VIOLATIONS: Respondent concedes that he did not provide full information on his renewal application within the meaning of A.R.S. § 32-2153(B)(1).
DISPOSITION: Respondent shall pay a civil penalty in the amount of $1,000. He shall attend six hours of continuing education courses in the category of Commissioner's Standards and Real Estate Legal Issues.

99A-147
Inter-American Realty dba Cimarron Properties
Tucson
DATE OF ORDER: January 16, 2001
FINDINGS OF FACT: Inter-America is licensed as a real estate broker and manages rental properties for compensation within the meaning of A.R.S. § 32-2171. Inter-America does business as "Cimarron Properties."

Michael R. Roy is the president and sole owner of Cimarron. He acquired ownership of Cimarron in 1992. Prior to that time he was employed as a real estate salesperson by Cimarron. His real estate

salesperson's license expired in May 1998. He is presently licensed as a real estate broker and is the designated broker for Cimarron.

Cimarron, through the acts and/or omissions of its former officers, shareholders and the designated broker failed to keep proper trust account records and to maintain a proper balance in the trust account. Various audits conducted by the Department have revealed a significant deficit in the account.

The deficit has existed since 1992 when Roy acquired ownership of Cimarron. He had knowledge of the deficit, but not its full extent, when acquiring Cimarron, and assumed the obligation to rectify the deficit.

The Department's most recent audit, conducted in December 1998, revealed a deficit in the amount of $54,000 or more.

Roy has made efforts to rectify the deficit. and has submitted documentation that shows he deposited $10,000 into the account in August 1999, $5,569,78 in November 1999, and $4,000 in August 2000.

VIOLATIONS: Cimarron, through the actions of its prior officers or shareholders:

a. has disregarded or violated the provisions of Arizona Revised Statutes, Title 32, Chapter 20,in violation of A.R.S. § 32-2153(A)(3);

b. has commingled monies of its clients with its own or converted that money or property to it or another, in violation of A.R.S. § 32-2153(A)(16);

c. has demonstrated negligence in performing acts for which a license is required, in violation of A.R.S. § 32-2153(A)(22);

d. failed to deposit and/or maintain all rental property owners' monies in its property management trust account, in violation of A.R.S. § 32-2174.

DISPOSITION: Roy and Cimarron shall make monthly deposits of $1,000 into the trust account. The deposits shall be separate from and in addition to any and all deposits into the account that are "owners' monies" within the meaning of A.R.S. § 32-2174.

Roy and Cimarron shall submit proof of each monthly deposit in the form of a bank deposit receipt. Roy and Cimarron shall engage an independent CPA to conduct an audit and determine the amount of the current deficit, if any.

00A-110
Carolyn C. Curtis dba Coldwell Banker-Curtis Real Estate
Safford

DATE OF ORDER: January 18, 2001

FINDINGS OF FACT: Curtis is currently, and was at all time material to this matter, licensed as a self-employed broker, dba Coldwell Banker-Curtis Real Estate. Sharon J. Fox was employed as a real estate salesperson by Curtis from October 19, 1999 to December 1, 2000. On December 1, 2000, Fox's employment with Curtis was terminated. Fox is currently an inactive real estate salesperson.

On March 21, 2000, Jason Wickliff executed a residential listing agreement with Curtis Real Estate through Fox for the sale of property he owned in Safford. Curtis reviewed and initialed the agreement on March 23, 2000.

On May 30, 2000, Fox signed Wickliff's name on a Listing Addendum instrument without written authorization from Wickliff. Fox wrote, "as per phone conversation," and a date under the seller's signature line on the Listing Addendum. The instrument reduced the listing price from $85,000 to $70,000 and under "Other" it reads, "$1,000 selling agent bonus make offer."

Curtis did not review and initial the Listing Addendum within five days.

Wickliff alleges his signature was forged because he was at work in Phoenix when it was signed and dated. Fox did inform Curtis of the addendum but did not provide Curtis with a copy to review.

VIOLATIONS: Curtis failed to review and initial the listing addendum within the meaning of A.R.S. § 32-2151.01(G), in violation of A.R.S. § 32-2153(A)(3).

DISPOSITION: Curtis to attend six hours of approved continuing classes in the categores of Commissioner's Standards, Agency Law, Contract Law or Real Estate Legal Issues.

00A-147
Ian Chait
Scottsdale

DATE OF ORDER: January 22, 2001

FINDINGS OF FACT: On November 13, 2000, Chait submitted an original application for a real estate salesperson's license in which he disclosed that he had been convicted of a felony and that the Department had denied him a real estate license in 1998.

The denial was based on convictions in 1990 for theft, 1991 for possession of marijuana, 1995 for possession of prohibited drugs and drug paraphernalia (class 4 and 6 felonies), 1995 for reporting false information and driving on a suspended driver's license, 1996 for misconduct with a weapon, and 1996 for misconduct involving a weapon, a class 4 felony.

VIOLATIONS: Respondent's convictions constitute crimes of theft and/or moral turpitude, in violation of A.R.S. § 32-2153(B)(2). His conduct and actions tend to show he is not a person of good character within the meaning of A.R.S. § 32-2153(B)(7).

DISPOSITION: Respondent's November 13, 2000 application for a real estate salesperson's license is approved subject to conditions and restrictions set forth herein.

The Department shall issue Respondent a two-year provisional real estate salesperson's license upon entry of this Order. Respondent shall comply with the following terms and conditions during all periods of active and inactive licensure:

a. Respondent shall completely abstain from the use of any and all alcohol, illegal drugs or controlled substances unless taken pursuant to a valid prescription and order of a medical doctor;

b. Respondent shall submit to body fluid tests or breath tests, randomly drawn, not to exceed two per month at the request and election of the Department's Compliance Officer.

c. Within 10 days of employing Respondent, each designated broker shall file with the Compliance Officer a signed statement certifying that such broker has received a copy of this Consent Order and agrees to act as Respondent's practice monitor. The practice monitor shall submit quarterly written reports to the Compliance Officer which attest to Respondent's workload, as well as the quality of his services and client relationships. The practice monitor shall be responsible for reporting any behavior or conduct which violates real estate statutes or rules, or any precepts or standards as prescribed by the National Association of Realtors' Code of Ethics.

00A-127
Bernice Martinez
Phoenix

DATE OF ORDER: January 31, 2001

FINDINGS OF FACT: In her October 31, 2000 application for a real estate salesperson's license, Petitioner disclosed a 1991 conviction for Bank Embezzlement and 1991 and 1995 convictions for DUI.

VIOLATIONS: Petitioner has been convicted of a crime of theft and/or a crime of moral turpitude or any other like offense, in violation of ars 2153(B)(2). She has been guilty of conduct which constitutes dishonest dealings, in violation of ars 2153(B)(5). Her conduct does not reflect that she is a person of honesty, truthfulness and good character within the meaning of ars 2153(B)(7). Petitioner violated terms of her criminal sentencing order, in violation of ars 2153(B)(9). She violated federal laws that involve theft and dishonest dealings, in violation of ars 2153(B)(10).

DISPOSITION: Petitioner's application is approved provided she satisfies all conditions set forth herein. The Commissioner shall issue Petitioner a two-year provisional real estate salesperson's license effective upon entry of this Order.

a. Petitioner shall post a surety bond in the amount of $5,000 for a period of two years.

b. Petitioner shall abstain completely from the use of any alcohol, illegal drugs or controlled substances unless taken pursuant to a valid prescription and orders of a medical doctor.

Petitioner shall submit to body fluid tests or breath tests, randomly drawn, not exceeding two per month, at the request of the Department's Compliance Officer.

Two ADRE bills introduced in legislature

Proposed amendments and additions to Arizona real estate statutes published on our web site have been introduced in the Arizona Legislature by Reps. Steve Huffman, Barbara Leff and Carol Somers.

The text of the introduced bills is substantially the same as the proposed text which has been available on our web site for several weeks.

House Bill 2023 adds an exemption from the public report requirement to allow the sale of an improved subdivision lot (one with a dwelling). Conditions for the exemption include:

1.Within the prior 12 months, the seller has not had an ownership interest in more than two lots in the subdivision.

2.The sale is the first or second within the previous twelve month period.

3. Water and sewage service, streets, roads, and common areas (landscape and recreational facilities) are complete and maintained by appropriate county, town, city, or by the legally created planned community association.

4. Monies are deposited and held in a neutral escrow account.

House Bill 2024 would make these changes to real estate statutes:

• Allows the license application to be submitted electronically.

• Permits a licensee to be employed by more than one broker, but only when the categories are different (i.e. cemetery, membership camping or real

Continued on page 8

Referral Rebates and Kickbacks

Continued from page 2

revocation of the license, plus civil penalties.

Association of Realtors

Violation of the Code of Ethics could result, depending on the seriousness of the violation(s), in up to a $2,500 fine and expulsion from NAR membership and MLS (Multiple Listing Service) participation for up to three years.

Lawsuits

An adverse civil judgment may result from a lawsuit involving violation of the law and, to the extent that a violation of the Code of Ethics may be considered falling below the standard of care, it too might result in an adverse judgment.

Payment of Compensation

Any referral fee, rebate or compensation that arises out of a real estate transaction in which a licensee is involved is real estate compensation. Therefore, all such compensation must be paid through the brokerage. The salesperson may not receive, for instance, a kickback directly from the pool contractor. The payment must be made to the brokerage.

How to Disclose and Informed Consent

There are two components in making any disclosure of material information. The disclosure must be made in a timely manner and in a meaningful way. Timely manner implies the disclosure is made at a time before the principal commits significant resources, either time or money. Meaningful way implies disclosure in such a way that the principal at least understands enough to make further inquiry into the matter. In the case of a kickback for service referrals, an additional level of response is required of the client-informed consent. This implies a level of understanding that allows the client to compare options and to make a reasoned decision based on the disclosure. Informed consent is always obtained in writing.

Do the right thing!

Ethical and moral high ground dictates that a true professional will always want a client or customer to know the licensee is profiting off the principal. However, when I ask a licensee why, for instance, he does not want the client to know about the custom home builder's commission back to him, a not untypical response is that, if told, the principal may balk at the idea, believing (not unreasonably) that the commission adds to the cost of the home. Therefore, the licensee does not inform the client, placing self-interest above the consumer's interest. There is only one reason not to attempt to obtain prior written consent to receive the kickback: fear the commission will be eliminated.

Altogether, it is difficult to find better guidance in these matters than that provided by the Golden Rule. When confronted with a question of material disclosure, Commissioner Holt's plea to the licensee has been for the licensee to put himself in the position of the principal. Wouldn't you want to know if you were the principal?

Edwin J. Ricketts is a broker-counselor and educator. He served as Deputy Commissioner of the Arizona Department of Real Estate from 1991 to 1997. He may be reached at EJRetal@fastq.com or 602-277-4332.

New documents on web site can prepare you for a field audit

Several documents recently added to the Department of Real Estate web site reveal what a Department Field Auditor will expect to see when auditing a brokerage.

The documents include a list of the files an auditor will expect to find in your office for both sales and property management activities, file retention-time requirements, the requirements for employment and property management agreements, trust account basics, a sample trust account spread sheet, a sample listing and sales log, and an illustration of the proper signs with which to identify your brokerage.

You can access the documents from our web site at www.re.state.az.us/library.html.

Far more information that will prepare a broker for a Department audit can be obtained by attending a Broker Management Clinic. Attendance for new brokers is mandatory within 90 days of licensure.

More information about Broker Management Clinics may be found on page 11 of this issue of the *Bulletin*.

New legislation

Continued from page 7

estate).

•Requires an applicant for a real estate broker's license to attend a broker management clinic prior to license activation. Additionally, a broker must attend the clinic prior to becoming a designated broker unless recently attended.

• Authorizes off-site, in-state storage of records upon prior written notification to ADRE.

• Specifies a 20-day time limit for a respondent to answer a formal complaint.

• Provides for but does not limit the commissioner to a summary suspension if a licensee is convicted of a felony.

• Prohibits a licensee from conducting real estate related business while incarcerated and establishes a Class 6 felony [.5/1.5 yrs. and $150,000] for a violation.

• Clarifies that the Real Estate Recovery Fund will only cover actual out-of-pocket losses. Increases the amount covered by the fund after May 1, 2001:

- From $20,000 to $30,000 per transaction.
- From $40,000 to $90,000 per licensee.
- Clarifies the circumstances under which the recovery fund is not liable for damages.
- Outlines and clarifies the documents and receipts that must be submitted to the department when seeking payment from the recovery fund.
- For court actions that may result in collection from the recovery fund, establishes a 45-day period in which to notify the commissioner of the filing. Specifies that the notice shall be addressed to the recovery fund administrator.
- Stipulates that serving notice to the commissioner shall be by certified mail, return receipt requested, and addressed to the recovery fund administrator.
- Clarifies the equitable distribution of monies from the recovery fund.
- Requires a licensee to submit proof to the commissioner that a judgment paid from the recovery fund has been fully satisfied.

The progress of the bills can be tracked through the Arizona Legislative Information System on the Internet at www.azleg.state.az.us.

Unapproved continuing ed can be a waste of money

Substantive Policy Statment No. 27 outlines the limited conditions under which a licensee may receive credit for a continuing education course which was not approved by the Department's Education and Licensing Division. This is a change from past practices

There are several reasons for this action:

• A statutory requirement and a procedure defined in the Commissioner's Rules requires course approval before the course is offered. Issuing credit for a course offered by an organization or company which did not apply or qualify for approval, and which did not apply for course and instructor approval, circumvents the law.

• Approving a course for credit after the fact deprives the Department of the opportunity to audit the course. An audit might reveal that the course sponsor did not require or monitor attendance, that the instructor did not teach the required course content, did not follow an approved outline, or students might have been bombarded by promotions and advertising during the course.

• Limitations on Department staff time make it difficult for the Department to review a large number of requests for credit for courses which have not been approved.

• Other than a fingerprint fee, it costs nothing for an organization or company to be approved as a real estate school and obtain course and instructor approval.

Successful completion of an ARELLO (Association of Real Estate License Law Officials) certified, interactive distance-learning course will qualify for credit without preapproval. Real estate licensees who are attorneys can request real estate continuing education credit for attending courses approved for continuing legal education (CLE) by the American or State Bar Association as long as the course covers real estate topics.

Rental property must be registered with County Asssessor

Licensees should inform owner of requirement

Arizona Revised Statutes require the owner of residential rental property to register the property with the assessor in the county where the property is located. The property cannot be occupied until registration is complete.

If you engage in property managment, or act as an agent in a transaction involving residential rental property, you should make sure the owner of the property is aware of A.R.S. § 33-1902. Because the statute is brief, we have quoted it here in its entirety. Note that failure to register the property could cost the owner a significant civil penalty.

A.R.S. § 33-1902 Residential rental property; recording with the assessor; agent designation; civil penalty

A. An owner of residential rental property shall maintain with the assessor in the county where the property is located information required by this section in a manner to be determined by the assessor. The owner shall update any information required by this section within ten days after a change in the information occurs. The following information shall be maintained:

1. The name, address and telephone number of the property owner.

2. If the property is owned by a corporation, limited liability company, partnership, limited partnership, trust or real estate investment trust, the name, address and telephone number of any of the following:

(a) For a corporation, a corporate officer.

(b) For a partnership, a general partner.

(c) For a limited liability company, the managing or administrative member.

(d) For a limited partnership, a general partner.

(e) For a trust, a trustee.

(f) For a real estate investment trust, a general partner or an officer.

3. The street address and parcel number of the property.

4. The year the building was built.

B. An owner of residential rental property who lives outside this state shall designate and record with the assessor a statutory agent who lives in this state and who will accept legal service on behalf of the owner. The owner shall designate the agent in a manner to be determined by the assessor. The information shall include the name, address and telephone number of the agent.

C. Residential rental property shall not be occupied if the information required by this section is not on file with the county assessor. This subsection does not affect any existing lease.

D. All records, files and documents that are required by this section are public records.

E. A person who fails to comply with any provision of this section shall be assessed a civil penalty of one thousand dollars, plus an additional one hundred dollars for each month after the date of the original violation until compliance occurs. The court shall not suspend any portion of the civil penalty provided by this subsection.

F. Notwithstanding subsection E of this section, if a person complies within ten days after receiving the complaint that notices the violation, the court shall dismiss the complaint and shall not impose a civil penalty.

2000 Real Estate Law Book available

The 2000 edition of the *Arizona Real Estate Law Book* is now available.

This new edition contains all amendments and additions to real estate statutes enacted in the recent legislative session

You may order your copy by mail or at our Phoenix or Tucson office. The cost is $15 for the book and $7 for a special seven-ring binder. The book fits the binder furnished with previous editions.

If ordered by mail, add $3 for shipping charges. Mail your check for $18 (no binder) or $25 (book and binder) to Law Book, ADRE, 2910 N 44th Street Ste 100, Phoenix AZ 85018.

Lombardo v. Albu

Thomas Stoops

Continued from page 1

and Restatement (Second) of Torts.

The significance of this portion of Justice Martone's decision is that this appears to be the first case in Arizona to hold that a buyer has an affirmative duty to disclose to the seller that there is a significant risk of his inability to perform. This holding may be of great significance to the relationship between the buyer and seller. For instance, it has not been unusual for a buyer to make an offer on real property knowing he cannot perform but hoping to flip the property in a double escrow. If the buyer fails to perform, the Lombardo decision seems to impose tort liability on the buyer if the buyer has failed to disclose the questionable nature of his finances.

Justice Martone then analyzes the duties owed by the agents. The court notes that the Lombardos agree that the only fiduciary duty an agent has runs to his client. The court disagreed, however, with Albu's position, that because there was no fiduciary duty to the seller, the agent had no duty at all to the seller. Albu also argues that a duty to disclose to the seller would conflict with the agent's fiduciary duty not to disclose her clients confidential information. The court found that this argument was a fallacy, noting that there could be no breach of fiduciary duty not to disclose the client's confidential information because the client would have had a duty to the seller to disclose facts critical to her ability to perform. Thus, the court found that the financial wherewithal of the buyer to perform is not confidential information. The court quotes from the Restatement (Second) of Agency and the Restatement (Second) of Torts, noting that § 348 of the Restatement (Second) of Agency is highly instructive:

Although the making of a contract by the agent does not constitute a representation by him that his principal is known by him to be solvent or honorable, if the agent knows that the principal does not intend to perform the contract because of hopeless insolvency or other reason. the making of a contract for him under such conditions subjects the agent to liability. See Restatement of Torts, § 530. Likewise, if the agent fails to reveal circumstances which make it impossible for the principal to perform, the other party has the remedies given for misrepresentation. See the Restatement of Restitution, § 8.

The Arizona Supreme Court noted that these principals are not limited to fraud, holding that an agent is also liable for negligence to third parties, including negligent misrepresentation, even though he is acting on behalf of his principal. Justice Martone went on to state that, "In rejecting the existence of the legal duty flowing from the buyer's agent to the seller, the panel below rejected a contrary ruling by another panel of the court of appeals in Aranki,..." The Arizona Supreme Court noted that, "...Aranki simply acknowledged the compatibility of the fiduciary duty an agent owes to his client with the duty to deal fairly with all other parties to the transaction." The court held that the regulation in question was merely a codification of the common law, and that the regulation acknowledges the agent's fiduciary duty to its principal but also acknowledges the agent's non-fiduciary duty to other parties to the transaction. The court also went onto hold that Subparagraph B of the rule provides "minimum standards of care in the exercise of the agent's duties." The court noted that, "From what we have said so far, it seems plain that R4-28-1 101 satisfies section 286 such that it prescribes an appropriate standard of conduct in this case." The court declined to rule on whether a private cause of action arises directly out of the regulation.

The publication of the Arizona Supreme Court Opinion in Lombardo has already generated a huge volume of comment and controversy. It is respectfully submitted, however, that the Arizona Court of Appeals' decision in Lombardo was the anomaly, and the Arizona Supreme Court decision simply clarifies the duties of honesty and disclosure which have long been considered the standard to which agents are held.

Thomas Stoops is a partner in the firm of Stoops & Kloberdanz, P.LC. and is a State Bar Certified Real Estate Specialist.

Michael Denious

Continued from page 1

formation that the buyer may be unable to perform, due to insolvency or otherwise[,]' is a 'codification' of the common law, and 'prescribes an appropriate standard of conduct[.]'

Mr. Denious added that the Supreme Court's holding does not ignore or lessen the fiduciary duty owed by a real estate agent to his or her principal. "As the court stated with reference to R4-28-1101(B)," he said, "it acknowledges the agent's fiduciary duty to its principal but also acknowledges the agent's non-fiduciary duty to other parties to the transaction."

In its decision, the Court found the duty to deal fairly will require a buyer or the buyer's agent to disclose "facts critical to [the buyer's] ability to perform," including the "financial wherewithal of the buyer to perform the contract[.]" Id. at 38, 14 P.3d at 291, The court held that such information is not confidential where it is critical to the buyer's ability to perform. See *Lombardo*, 336 Ariz. Adv. Rep. at 37-38, 14 P.3d at 290-91.

In its present form, Rule R4-28-1101(B) provides:

B. A licensee participating in a real estate transaction shall disclose in writing to all other parties any information which the licensee possesses that materially and adversely affects the consideration to be paid by any party to the transaction, including:

1. Any information that the seller or lessor is or may be unable to perform;
2. Any information that the buyer or lessee is, or may be, unable to perform;
3. Any material defect existing in the property being transferred; and
4. The possible existence of a lien or encumbrance on the property being transferred.

A.A.C. R4-28-1101(B)(l)-(4)(1999). This version differs from the version in effect at the time of the transaction in *Lombardo*, which specifically referenced "insolvency" as an example of inability to perform. The Supreme Court found, however, that this change did not alter the substance or effect of the Rule.

Confusion exists about Broker Management Clinic requirements

It appears there is some misunderstanding about Broker Management Clinics.

Substantive Policy Statement 4, and A.R.S. § 32-2136(C) state attendance requirements.

1. Each new real estate broker licensee must attend a broker management clinic within 90 days after original licensure as a broker.

2. Each associate real estate broker licensee who changes status to designated real estate broker must attend a broker management clinic within 90 days of the status change, unless the broker has taken the course within the current license period.

3. Each designated (including self-employed) real estate broker must attend a broker management clinic once every two year licensing period.

An Order will be issued summarily suspending the real estate license of any designated broker who has not attended a management clinic, with a copy of the Order mailed to the licensee's employing broker, if employed.

A broker whose license has been suspended for non-compliance may (1) request a hearing on the suspension or (2) demonstrate compliance, in which case the Commissioner will vacate the suspension and the broker may reinstate the license pursuant to A.R.S. § 32-2131(A).

The three hours of continuing education credit earned at a Broker Management Clinic may be used to satisfy the three hours mandated for Commissioner's Standards.

A waiver of the continuing education hours does not relieve a broker of the requirement to attend a Broker Management Clinic within the time-limits stated in the statute and the Substantive Policy Statement.

Real estate schools approved to offer Broker Management Clinics are:

- Arizona Association of Real Estate Exchangors, Mesa (480) 649-3536
- Arizona School of Real Estate and Business, Scottsdale (480) 946-5388
- Best School of Real Estate, Sedona (520) 282-1611
- Brodsky School of Real Estate, Tucson (520) 747-1485
- Bud Crawley School of Real Estate, Phoenix (602)263-0090
- Cecil Daniels Realcor, Peoria (623) 334-5170
- Central Arizona Realty Educators,
- Hogan School of Real Estate, Tucson (520) 327-6849
- Mary Lee Greason Seminars, Tucson (520) 885-4616
- NorthWestern School of Real Estate, Bullhead City (520) 758-6922
- Phoenix Association of Realtors®, Phoenix (602) 246-1012
- Prescott Academy of Real Estate, Prescott (520) 776-0506
- Prescott Valley School of Real Estate, Prescott (520) 708-9544
- Professional Institute of Real Estate, Scottsdale (480) 947-8000
- ReNewal Education Corporation, Phoenix (602)765-0500
- Sedona Verde Valley Association of Realtors,® Sedona (520) 282-1611
- Southeast Arizona Association of Realtors®, Sierra Vista (520) 458-7802
- Westford College, Glendale (602) 995-9000
- Tucson School of Real Estate, Tucson (520) 885-1999

Duane Turner

Duane Turner, 63, the Operations Manager for the Department of Real Estate's Tucson Office until his retirement in December 1998, died January 29 in Tucson.

He joined the Department in 1978 as an investigator and was promoted to Operations Manager in March 1981.

He was a graduate of Texas A&M and Pepperdine Universities and served in the U.S. Army for 16 years before retiring with the rank of Major.

Donations may be made to the Make-A-Wish Foundation, 711 E. Northern Avenue, Phoenix AZ 85020.

Do we have your correct address?

When you change your address, you notify your friends and family, but a surprising number of you forget to notify the Department.

Commissioner's Rule R4-28-303(E)(2) requires you to notify the Department of a change in your home address within 10 days.

It costs nothing, and you're not required to fill out a form. Simply mail a signed note to the Department stating your full name and old and new address. Because we cannot verify the origin of emails, a change of address notice must be in writing.

Legislative Budget committee says no to *Bulletin* mailings

The Joint Legislative Budget Committee declined to approve an appropriation of $50,100 that would have enabled the Department to mail the *Arizona Real Estate Bulletin* four times a year at no charge to the state's more than 46,000 active and inactive real estate licensees.

The action was taken despite recommendations from both the committee's own analysts and the Governor's Office that the appropriation be approved. The money would have paid for printing, addressing and postage.

From its inception in September 1968 until June 1996, the *Bulletin* was mailed at no charge to all active and inactive licensees. In 1996, budgetary restrictions made it impossible to continue to pay the cost of printing and mailing. In June 1996, the Department began publishing six issues of the Bulletin each year on its web site. Readers may purchase a mail subscription for $10.

For the past two years, the Department has found enough money in its budget to mail one copy each year to all licensees. The last mailing was made in December 2000, and produced a marked increase in visits to the Department's web site, and in requests to be added to our Late-Breaking News emailing list.

The Department will continue to publish the *Bulletin* six times each year on its web site. To receive the Bulletin by mail, send a check for $10 to Bulletin, ADRE, 2910 N 44th Street, Phoenix AZ 85018.

To obtain the publication from the Internet, point your browser to www.re.state.az.us.

ARIZONA
REAL ESTATE BULLETIN
Arizona Department of Real Estate
2910 N 44th Street, Phoenix AZ 85018-7256